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In the Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1331

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
and
COLONEL HAROLD E. KNOWLTON, DIRECTOR
DIVISION OF STATE POLICE,
PETITIONERS,

v.

DONALD W. CARLSON,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent Donald W. Carlson respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's decision in this case. That decision is reported at 609 F.2d 1024.

Question Presented

Whether the transfer of a New Hampshire state tropper to a trooper position involving different duties and different hours and days of work, which transfer would not have occurred but for said trooper's training obligations as a member of the United States Air Force Reserve, denies such trooper an "incident or advantage" of employment contrary to § 2021(b)(3) of the Veterans Readjustment Assistance Act, 38 U.S.C. §§ 2021-2026?

Statement of the Case

On February 23, 1979 Donald W. Carlson filed a Complaint arising under 38 U.S.C. §§ 2021-2026 with the United States District Court in Concord, New Hampshire. The decision of the District Court (Devine, J.) dated April 13, 1979 granted Petitioners' Motion for Summary Judgment and denied Respondent's Cross Motion for Summary Judgment. Upon denial of a Motion for Rehearing, Respondent timely filed his appeal to the United States Court of Appeals for the First Circuit. The case was heard in oral argument on October 1, 1979 and a decision was rendered by the Court of Appeals (Campbell, J.) on November 30, 1979, reversing the District Court and ordering entry of summary judgment for Respondent Carlson. Petitioners filed a petition for a writ of certiorari with this Court on February 28, 1980.

The facts relevant to the issue presented for review are as follows:

Respondent is a permanent employee of the Division of State Police, New Hampshire Department of Safety and has been so employed since June 17, 1968. From July 2, 1976 until his return from military leave of absence on February 20, 1979, Respondent held a position entitled

Patrol # 17 in Troop I. Petitioner Knowlton is and was at all times material hereto the Director of the Division of State Police of the New Hampshire Department of Safety.

Respondent also is and was at all times material hereto a military reservist. In August, 1978 Respondent notified Petitioners of his transfer from the Air National Guard to the Air Force Reserve and informed them of his upcoming need for military leave of absence for two training periods, each of six weeks duration, the first of which was to commence early in 1979. After months of repeated denials of military leave by Petitioner Knowlton, permission was finally granted for this military leave of absence for six weeks, just two days before such leave was to commence. There was no backlog of work in Patrol # 17, Troop I when Respondent left for military duty on January 5, 1979. Respondent attended his active duty training session and thereafter reported to work on the next regularly scheduled work day. On the very day of his return to employment following said military leave, Respondent was told by Petitioner Knowlton that he was transferred from Troop I to Troop G. Thereafter, Respondent initiated this suit.

The United States Court of Appeals found that the job responsibilities, required training, duty hours, weekend work, nature of the work performed and duty area of Respondent's position in Troop I were vastly different from those of Respondent's position in Troop G. The court below further found that the sole reason motivating Respondent's transfer was his military obligations as a member of the United States Air Force Reserves. Finally the court below concluded that the transfer of Respondent solely because of his military obligations violated 38 U.S.C. § 2021(b)(3) and ordered that Respondent be returned to Troop I, Patrol # 17.

Reasons Why the Writ Should Be Denied

I. A Claimed Conflict Between the Decision of the Court of Appeals in This Case and One or More District Court Decisions Provides No Sound Basis for Granting the Writ.

Petitioners claim the decision below is in conflict with decisions of other courts, citing *Kidder* v. *Eastern Airlines, Inc.*, 469 F.Supp. 1060 (S.D. Fla. 1978), *Lott* v. *Goodyear Aerospace Corp.*, 395 F.Supp. 866 (N.D. Ohio 1975) and *Monroe* v. *Standard Oil Company*, 446 F.Supp. 616 (N.D. Ohio 1978). This claimed conflict, of itself, does not provide a sound basis for granting certiorari.

II. The Decision of the Court of Appeals Is Not in Conflict with the District Court Decisions Cited by Petitioners.

Petitioners claim that the narrow terms and conditions of the underlying employment relationship were determinative in *Kidder, supra, Lott, supra* and *Monroe, supra.* Careful analysis of those cases reveals that strict application of the underlying employment relationship would and did result in the denial of the claimed benefit in each case. The denied benefit was restored in each case by the District Court because those courts correctly perceived that if a benefit would be denied by the terms of the underlying employment relationship because of absence to attend military reserve obligations, then 38 U.S.C. § 2021(b)(3) would close the loop-hole. This is precisely the rationale of the Court of Appeals in this case.

III. The Decision of the Court of Appeals in This Case Is Not in Conflict with Decisions of Other Courts of Appeals Interpreting and Applying 38 U.S.C. § 2021(b)(3).

In *Carney* v. *Cummins Engine Company, Inc.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, — U.S. —, 48 U.S.L.W. 3535 (1980), the court held that a provision of a collective bargaining agreement which denied reservists but not other employees the right to work missed overtime if they transferred departments before working such missed overtime was in violation of 38 U.S.C. § 2021(b)(3). In *West* v. *Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980), the collective bargaining agreement guaranteed forty hours of work per week unless an employee was absent or tardy according to his work schedule. The court held that 38 U.S.C. § 2021(b)(3) required that the employer treat the reservist employee as constructively present on days when he had reserve obligations and ruled that the forty hour guarantee therefore had to be honored. The rationale of *Carney* and *West* is totally consistent with the rationale employed by the First Circuit in this case.

In *Monroe* v. *Standard Oil Co.*, — F.2d —, 103 L.R.R.M. 2317 (6th Cir. 1980), the Sixth Circuit reversed the decision of the Northern District of Ohio, 446 F.Supp. 616 (1978).[1] The seeming conflict created by the reversal does not provide a sound basis for granting the petition in this case for the following reasons:

A. The nature of the benefit denied Carlson is totally different from the nature of the benefit denied Monroe.

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[1] Respondent is advised that a Motion for Rehearing was filed in *Monroe* on March 7, 1980.

B. *Carlson* involves a blatant case of discrimination against an employee with reserve obligations solely because of those obligations. It is at least arguable, therefore, that the Sixth Circuit would find the *Carlson* result consistent with *Monroe,* in the same manner in which it found the *Carney* result consistent with *Monroe.* 103 L.R.R.M. at 2321.

C. The result in *Carlson* could equally well have been achieved by proper interpretation and application of 38 U.S.C. § 2024(d).

D. Assuming that the Sixth Circuit adheres to its opinion following rehearing, or denies rehearing, the *Monroe* decision is in direct conflict with the *West* decision, both cases involving the denial of precisely the same benefit.

E. The *Monroe* decision is illogical and inconsistent, creating a classic "Catch 22" requirement wherein the reservist must be present at work on days when he has reserve obligations in order to create a benefit protected by 38 U.S.C. § 2021(b)(3), which statute is designed to prevent discrimination against reservists because of their reserve obligations, the most common of which is compelled absence to attend drills.

IV. THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS CONSISTENT WITH GENERAL PRINCIPLES OF CONSTRUCTION ENUNCIATED BY THIS COURT IN PRIOR DECISIONS INVOLVING THE VETERANS READJUSTMENT ASSISTANCE ACT OR ITS PREDECESSORS.

The Court of Appeals correctly rejected Petitioners' restrictive interpretation of 38 U.S.C. § 2021(b)(3) as being at odds with general principles enunciated by this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U.S.

275 (1946) and *Alabama Power Co.* v. *Davis,* 431 U.S. 581 (1977). Since the Court of Appeals found beyond any doubt that but for Respondent's reserve obligation he would not have been transferred, there can also be no doubt that Petitioners' restrictive interpretation would permit an employer's practice to cut down service adjustment benefits provided by Congress contrary to *Fishgold, supra,* 328 U.S. at 285, and would deny a benefit that would have accrued with reasonable certainty had the veteran been continuously employed contrary to *Alabama Power, supra,* 431 U.S. at 589. Since the Court of Appeals' decision is consistent with general principles enunciated in decisions of this Court, no occasion for review by this Court arises.

V. PETITIONERS' ARGUMENT BASED ON UNREASONABLE INTERFERENCE IS WITHOUT MERIT AS ITS FACTUAL BASIS WAS DECIDED ADVERSELY TO PETITIONERS BY THE COURT BELOW ON SUBSTANTIAL EVIDENCE AND SHOULD NOT BE HEARD AS ITS CONSTITUTIONAL BASIS WAS NOT RAISED AND PRESERVED IN THE COURT BELOW.

The Court of Appeals carefully considered and emphatically rejected the factual assertions which provide the basis for Petitioners' second argument. *Carlson, supra,* 609 F.2d at 1027 and nn. 5, 6; Appendix to Petition at A-5, A-6. This Court should not grant the petition to review these factual determinations.

Petitioners' second argument is also an attempt to have this Court determine the point at which a valid exercise of Congress' war powers unreasonably interferes with a state's police powers. While Petitioners could have raised this issue below, they did not do so. "The sole issues on appeal are whether [Petitioner] Knowlton's transfer of [Respondent] to Troop I [*sic*] violated 38 U.S.C. § 2024(d), whether [Respondent] raised a claim under 38 U.S.C.

§ 2021(b)(3), and if such a claim was raised, whether the provisions of § 2021(b)(3) have been violated." Petitioners' Brief in the Court of Appeals at 7. Since the District Court expressly stated that constitutional challenges to the application of 38 U.S.C. §§ 2021-26 to the states had been made and rejected, *Jennings* v. *Illinois Office of Education,* 589 F.2d 935 (7th Cir. 1979); *Peel* v. *Florida Department of Transportation,* 443 F.Supp. 451 (N.D. Fla. 1977), *subsequently aff'd,* 600 F.2d 1070 (5th Cir. 1979), Petitioners have failed to assert and preserve any claim based upon unreasonable interference with the police powers of The State of New Hampshire.

VI. The Petitioners' Dissatisfaction with Factual Determinations Made in the Court Below on the Basis of Substantial Evidence in the Record Provides No Basis for Granting the Petition.

At numerous points in their argument, Petitioners evince dissatisfaction with factual determinations of the court below. *E.g.,* Petition, p. 16 (failure to examine employment relationship); pp. 16-17 (purpose of transfer); pp. 24-25 (employee not disadvantaged). In each such instance, the Court of Appeals carefully weighed and considered all of the evidence presented before deciding, adversely to Petitioners, that the numerous differences in Respondent's pre and post transfer positions amounted to the denial of an incident or advantage of employment and that but for Respondent's reserve obligations he would not have been transferred. These issues, and other similar factual questions determined below upon substantial evidence, present no question suitable for review by this Court.

Conclusion

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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